United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

74-1611

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B

P/S

NO. 74-1611

REA EXPRESS, INC., et al.

Petitioner

v.

CIVIL AERONAUTICS BOARD, et al.

Respondent

ON PETITION FOR REVIEW OF AN ORDER OF THE
CIVIL AERONAUTICS BOARD

BRIEF FOR INTERVENORS

PET INDUSTRY JOINT ADVISORY COUNCIL, ASSOCIATION OF ANIMAL AND FISH DISTRIBUTORS, INC., NATIONAL PET DEALERS AND BREEDERS ASSOCIATION, INC., PET PRODUCERS OF AMERICA, INC., FLORIDA TROPICAL FISH AND FARM ASSOCIATION, INC., SAFARI ANIMAL IMPORTS, INC., GATORS OF MIAMI, INC., A-1 ANIMAL RANCH, INC.

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QUESTIONS PRESENTED

1. Whether the Board's Decision reversing the Initial Decision of the Administrative Law Judge reaffirming the findings of need for air express made by the Board over the past forty years should be remanded because of the failure of the Board to make specific findings to support its general conclusions and expressions of hope that airlines and air freight forwarders in some manner at some indeterminate time might provide expedited service for shippers.

2. Whether the termination of the integrated, through REA express service without provision for substitute through service violates Section 404 of the Federal Aviation Act.

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LIST OF AUTHORITIES CITED

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STATEMENT OF THE CASE

Preliminary Statement

This appeal contests the validity of actions by the Civil Aeronautics Board terminating the authority of REA Express, Inc. to act as an indirect carrier providing air

express service on a nation-wide basis.[1]

After lengthy hearing, Administrative Law Judge James S. Keith concluded that express service in its present form serves a useful purpose and should be maintained basically without change. He found (1) that there are important differences between air express and other forms of air freight; (2) that the present type of agreement between the airlines and REA is essential to the existence of air express service and should be continued; and (3) that REA is the only qualified ground agency willing and able to enter into agreement with the airlines to provide an air express service.

By Order 72-6-27, June 6, 1972, the Board exercised its right of discretionary review in the Express Service Investigation, Docket 22388.[2]

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1 The pertinent orders are: Docket No. 22388 Express Service Investigation, Opinion and Order (73-12-36) and Supplemental Opinion and Order (74-5-25); Docket No. 22387 Investigation of Air Express Rates, Order (74-5-23) and Order (74-5-24, denying consolidation); and Docket No. 26238 Discussions Concerning Industry-Wide Priority Air Cargo Service, Order Authorizing Discussions (74-2-118), Order on Reconsideration (74-4-1) and Order (74-5-74). The Service case is the case which has come to decision; the Rates case has been terminated as academic in view of the adverse action in the Service case.

2 The factual statements contained herein are drawn primarily from the findings of the Administrative Law Judge and the orders of the Board itself. References to the various decisions and opinions are as follows: "I.D."--the Initial Decision of the Administrative Law Judge Keith in Docket 22388; "O."--the CAB's Opinion and Order in Docket 22388 (73-12-36); "S.O."--the CAB's Supplemental Opinion.

By Order 73-12-36, December 7, 1973, the Board reversed the decision of the Administrative Law Judge and disapproved the agreements providing for air express service between REA and the airlines and terminated the exemptions enjoyed by REA for some forty years to conduct air express service.

By the same Order the Board awarded air freight forwarder authority to REA to be effective only after termination of air express service by REA.

By the same Order the Board asserted that air carriers have an obligation to offer priority service which might fill the gap in air transportation created by the demise of REA as the express carrier. [3]

Factual Statement

This Brief is presented in support of the Petition of REA Express, Inc., (REA) for review of orders of the Civil Aeronautics Board (CAB) which would summarily terminate air express service provided jointly by REA and the nation's airlines.

It is presented by the Pet Industry Joint Advisory Council, consisting of twenty pet industry trade associations, joined by several member associations and shippers, all of

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3 Chairman Timm, Vice Chairman Gilliand and Member Minetti concurred in the Opinion and Order (Order 73-12-36) and in the Supplemental Opinion and Order (Order 74-5-25), the primary orders at issue in this appeal. Members West and O'Melia did not participate.

whom, as breeders, marketers, shippers, dealers in small live animals, birds and/or tropical fish make use of and rely upon the air express transportation services of REA. (Pet Industry Parties) The Pet Industry Parties are major users of and are in large measure dependent upon the extensive air express services offered and performed by REA. Such services are presently not available from airlines or from air freight forwarders.

I. Air Express Service to Pet Industry Parties.

Air express provides essentially a small shipment, short haul service (I.D. 29, 31-32). Air express provides shippers with a door-to-door service, nationwide in scope, offering service to and from all airport cities served by certificated air carriers. (I.D. 36) This is the service used extensively by the pet industry. Characteristically, breeders of live animals originate shipments from small or rural areas destined for a wide scatter of large and small cities. Conversely, distributors of live animals ship from sizeable airports to the retail trade in a wide scatter of large and small cities.

The pet industry traffic is made up of small package, multiple destination shipments. This traffic is not amenable to consolidation for shipment between major points by the technique of air freight forwarding. On the other hand, large segments of the pet industry shippers are dependent upon the priority service provided only by REA to or from secondary and tertiary markets. (I.D. 33-36)

II. REA Provides A Unique And Essential Service To Shippers Such As The Pet Industry.

The Administrative Law Judge found that Air Express provides for a single entity for ground handling and administrative services which affords "substantial economies that can be passed on to the shipping public in the form of lower rates" (I.D. 50). He found that the one-carrier service produces single documentation for shipments which involve more than one carrier, simplifying procedures and rate structure, reducing costs, and stepping up service (I.D. 50 et seq.).

A. The early CAB decision on REA revisited.

In 1948 in the Air Freight Forwarder Case, the CAB reviewed and affirmed air express service. At that time the Board itself made detailed findings, to wit:

> The difference between air express and air freight lies principally in the ground and accessorial services provided and in the amount of the rates charged shippers for the respective services. Air freight is carried at rates usually less than half those assessed against air express. Air freight frequently moves on the same plane with air express and the airport-to-airport transit time is often the same. . .In spite of this heavy influx of air freight business, REA's air express operations have produced a steady and substantial increase in air express business. . .REA in its air express operations performs many services and undertakes many duties which the airlines themselves must perform in connection with air freight. . . In connection with air express REA, pursuant to the provisions of the air express contracts, assumes the responsibility for all pick-up-and-delivery services, collects all shipping charges,

> arranges the routing, supervises transfers, and performs the accounting functions necessary to keep an accurate record of the business and to make proper allocation of costs and accurate distribution of funds among the various airlines. Air Express is essentially a small-package business entailing a tremendous amount of detail in physical handling as well as in the accounting. . . 9 C.A.B. 481-482 (1948).

In a subsequent case, Air Freight Forwarder Investigation, 21 C.A.B. 536 (1955) the Board reaffirmed that there was "no sound basis for disturbing the present status of REA" (I.D. at 630) and that "there is no substitute available for the REA operations." (Ibid.)

B. Administrative Law Judge found that the current record requires a reaffirmation of the Board's early decisions.

As noted above, the Administrative Law Judge, based on extensive record before him, found that the services REA provides, accessorial to the simple airport-to-airport carriage of the express packages, provide substantial economies. (supra) He, too, found that today, as in 1948, the differences between air express and air freight lie principally in the ground and accessorial services. He recognized, as did the Board earlier, that air freight--generated by forwarder or carrier--frequently moves on the same plane and at equal speed with air express (I.D. 39-41-49) and that nevertheless air express growth has been substantial (I.D. 30), that REA for air express assumes many services and duties which would otherwise devolve upon the direct air carrier--pick-up-and-delivery, collection

of shipping charges, routing, accounting functions for distribution of express proceeds between itself and the various direct carriers (I.D. 28-29). And above all, REA is responsible for the tremendous amount of detail in physical handling of the great small package business.

In one significant respect the current operations differ from those in the Board's early decision. In 1948 express service rates were substantially higher than air freight rates; that premium service commanded a premium price. Today express rates are not premium rated.

It may be the transport economies effected by air express provide a rationale for this apparent anomoly. It may be REA does not receive an adequate allocation of the express dollar for its increased cost of service. These are issues touched upon in the Investigation of Air Express Rates, Docket 22387; but the CAB has summarily terminated that investigation since, if the CAB termination of REA service in the Express Service Investigation stands, any decision in the Rates case would be academic.

III. Termination Of Air Express Service Without Viable Substitute.

The Board in issuing its order in the Service case reversed the decision of the Administrative Law Judge and ordered termination of air express services. The Board took note of the gap in air transportation service it created in terminating air express by finding that "as part of the airlines" duty to provide reasonable transportation, they are under an obligation to offer highly expedited priority service under tariffs so

providing." (O. 38, footnote omitted) And it commented on purported plans of air freight forwarders to expand forwarder services to capture large portions of the traffic made homeless by the demise of air express.

SUMMARY OF ARGUMENT

I. The Order of the Civil Aeronautics Board here under review would terminate the authority of REA Express, Inc.(REA), in agreement with the certificated scheduled air carriers, to provide air express service as it has for approximately forty years. The Administrative Law Judge found that the air express service thus provided is distinguisable from other air freight services and is responsive to a public need; that air express by a single ground agency is in the public interest and should be maintained; that REA is the only qulaified ground agency willing and able to provide air express service; that it would not be in the public interest to issue piece-meal licenses for air express service to any indirect carriers independently of a joint agreement to provide shippers an integrated nation-wide service. The Administrative Law Judge's ultimate findings are bolstered, sustained, and upheld by a mass of subsidiary findings based upon the factual record of the extensive hearing. The Board in its decision reversed the Administrative Law Judge, and in support of its decision made purported findings as to the financial status of REA, which are irrelevant to the issues of public need, and made general statements as to the lack of uniqueness of air express service, and anticipated that the terminated service, when terminated, would be replaced by substitute services by air carriers and forwarders, services of indeterminate character, kind and time of creation. The basis for the Board's conclsuions of lack of

need of air express service is not clear. The reasons given are either irrelevant or inadequately developed, and the Board has failed to make a finding or ruling on each exception taken to the Administrative Law Judge's findings. The bare conclusions of the Board are insufficient. The Board having failed to make the requisite findings to justify and support its decision, the decision should be remanded for further appropriate action by the Board.

II. In conformity with Section 404(a) of the Federal Aviation Act, REA and the participating airlines have in air express furnished "air transportation...to provide a reasonable through service in such air transportation." The Board in terminating such air express service without providing a viable integrated through service substitute violates the statutory command.

ARGUMENT

I. The Board, In Reversing The Decision Of The Administrative Law Judge Who Found That The Public Interest Now, As In The Past, Requires Air Express Service By REA, Failed To Present Findings, Conclusions And Rulings In Sufficient Detail And Clarity To Comply With Legal Standards.

In its decision in the Service case the Board in sweeping generalization, with little relation to the record, reversed the decision of the Administrative Law Judge and ordered forthwith termination of REA express service. The needs of shippers such as the Pet Industry Parties were given scant consideration.[4] The Board further proposed to confer air freight forwarder status upon REA, to become effective only after express service termination. Admittedly there exists no substitute priority service. (S.O. 18) The Board avoided facing that issue by stating "as part of the airlines duty to provide reasonable transportation, they are under an obligation to offer highly expedited priority service under tariffs so providing". (O. 38, footnote omitted)

There is conflict between the concrete findings by the Administrative Law Judge and the broad generalizations of the Board. The law governing the consideration to be given to findings of examiner and Board, where they are in conflict is equally well settled. National Labor Relations Board v. Supreme Bedding & Furniture Mfg. Co., 196F. 2d 997,998,(5th Cir. 1952)

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4 ". . .the Board is aware that this service offers the lowest non-governmental rates to many small-package shippers. This would be a compelling reason to continue air express if that were possible." (O. 7, footnote omitted)

There it was found that the recommendations of the examiner were supported by substantial evidence while the findings of the Board were not. The enforcement of the Board's Order was denied.

In the case In Re United Corporation, 249 F. 2d 168,179 (3rd cir. 1957) the Court found the rule enunciated in the Bedding case was carried forward and codified in the Administrative Procedure Act (5 U.S.C. 1007(b)). It stated:

> The final order of an administrative agency must include findings and conclusions upon all material issues presented on the record. The reasons or basis for the decision must also be clearly enunciated. This principle is well established in the law and was expressly codified in Section 8(b) of the Administrative Procedure Act. Judicial interpretation of this requirement is legion. [5]

The Board in overruling the Administrative Law Judge elected to do so on only three counts: 1) speed of delivery, 2) geographic coverage and 3) commodity coverage.

A. Speed of Delivery and Priority Treatment

The Board in a page and one half concludes that air express is not faster and asserts that other forms of freight provide service that is as fast and faster than regular express service. It grounds its conclusions solely in "elapsed time survevs". The Board concedes some failings in the surveys, but concludes they do indicate that in the major markets at least REA's services are no faster than other freight services. (O. 15)

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5 cf. Universal Camera Corp. v. NLRB. 340 US. 474,95 L. Ed. 456 (1951); B&O Railroad Co. v. U.S., 201 F. 2d 795 (3rd cir. 1953); Public Utilities Commission of Conn. v. Federal Power Commission, 205 F. 2d 116 (3rd Cir. 1953)

However, the Administrative Law Judge points out that "the elapsed time surveys of these parties, because of their limited sampling in coverage, difference in approach, lack of comparative bases, and the presence of some biases, do not provide a reliable yardstick for measuring the door-to-door speed of air express vis-a-vis the other air freight services. (I.D. 39-41,48) He analyzes in the depth possible with such scanty data and finds that, with the possible exception of Emery, air express has a higher percentage of delivered shipments within 24 hours than do other forwarders. (I.D. 48) He also relates the survey data to other data showing that the bulk of the air express traffic does not move "in the major markets, at least" and that for the vast majority of shipments only REA provides its network of stations nation-wide to handle one carrier speedy service to all. (I.D. 31-51)

The Board with a few broad strokes points out that there is a large unused cargo capacity and that therefore air express benefits not all because of its right to space priority on aircraft. (O. 17) However, the Administrative Law Judge carefully analyzed the record data on priority shipments (I.D.32-33) and concluded that a survey by the airlines "demonstrates, beyond question, the advantage of the priority element of air express." (I.D. 48) He found that even in periods where there have been no general capacity problems, nevertheless, expeditious handling was in fact provided for a small percentage of air express shipments. "From this it is clear that during holiday seasons and other peak traffic occasions the advantage of priority could

be significant. . . In these circumstances, the priority feature. . .is an important feature in distinguishing it from the other air freight services." (I.D. 48)

In relying solely on survey comparison of transportation times between major points (forwarders appear in but few other places) the Board considers that forwarders provide equal or better delivery times. It can readily be admitted that air express is not faster in airport-to-airport transport time, true today as it was in 1948, when the Board itself made the point. It is on the ground that Air Express provides the unique service. The Board, however, compares the ground time for forwarders with that of REA - ignoring the facts that forwarder traffic is concentrated between major points for consolidated movements, that the average weight and piece dimensions of air freight are substantially large in units and require less handling, paper work and accounting for shipment. Neither the airlines nor forwarders are equipped to provide speedy service for the multitudes of small packages to many outlying points that REA now serves. Despite the Administrative Law Judge's findings on the wide spread and unique ground services provided by REA, the Board disposed of the issue solely with the phrase "express service does not provide for faster ground handling." (O. 14)

Despite the alleged equal or superior service by forwarders in terms of speed, the Board reluctantly admits the need for highly expedited service and that shippers use air express to satisfy these requirements. (O. 17) The Board finds that

"there is a need, albeit a very limited one, for service of that nature." (Ibid.)

If the competitive service were equal or as superior as the Board asserts, shippers such as the Pet Industry Parties, would have gravitated in large measure to air freight, leaving a limited utilization of REA. But that has not been the case. The demand for REA service has been increased. Total shipments grew from 6,766,000 in 1961 to 8,835,000 in 1970 with revenue growth $50,800,000 in 1961 to $98,800,000 in 1970. (I.D. 30) This is hardly response to a "limited need."

Again the Board looks to a paper solution. It concludes that "publication of high priority tariffs by the various direct air carriers" could replace REA's services. There is no record showing how this could be accomplished, at what cost to the shipper, or when the tariffs might be published, and more important when - in futuro - they might be implemented.

Meanwhile the Pet Industry and other shippers would have no integrated, nation-wide express service and would face economic destruction because they would not be able to get to market.

B. Geographic Coverage

The Board would supplant REA's actual wide-spread geographic coverage with the hope, bottomed in no factual record, that air freight forwarders provide or will provide comparable coverage. The Board relies on assertions made by forwarders that "many (if not all) gaps in geographic coverage resulting from a termination of air express will be quickly filled by

freight forwarder expansion." (O. 18) The Board points to evidence of "air freight forwarder plans to that effect." (I.D. at 19, emphasis supplied)

But plans are not performance. Despite the long passage of time since the forwarders said they have "plans" none has made them concrete. No measurable steps have been taken to provide substitute high priority service to small package shippers.

The forwarders and the airlines can be expected to welcome the windfall of on-line traffic that the demise of REA would provide. A goodly amount of major point to point traffic might be diverted into the forwarders' existing modes of handling freight, more onerous and costly to the shipper with no high priority which the shipper of perishables, such as the Pet Industry, requires. But no service for small package traffic outside the major centers has ever reached a public plan stage.

The Board sees REA's "historic broad geographic coverage (as) clearly a relic of the past. (O. 19-20, See S.O. 7) But the multitude of express shippers do not realize they are living in the past. They continue to ship to all points, large and small, throughout the country; REA continues to supply the lift. The complaint of the shipper is not that he is not getting geographic coverage; it is that now REA will be precluded from giving him any express service to anywhere - and no other provider of such service exists except in some "forwarder plans to that effect." (O. 18)

C. Commodity Coverage

The Board, noting the special need for express service for the carriage of live animals and birds, trusts that "As to the future, however, it is apparent that other air cargo services should fully meet the needs of the shippers." (O. 21) Again the Board would substitute inchoate future plans of REA competitors for REA performance. It ignores the fact that as of now large numbers of commodities are refused handling by forwarders. (I.D. 37-38, 45-47, 49-50)

For an intimate example, major forwarders with but one exception will not handle live animals. The one restricts traffic to laboratory animals (I. D. 37) For large numbers of commodities today REA is the only carrier.

The Board has relied upon generalizations to negate the buttressed findings of the Administrative Law Judge as to priority handling, geographic and commodity coverage, and upon hopes that gaps in non-express services will, somehow and sometime, be filled. The Board has been on this note before. In Trailways of New England, et al. v. Civil Aeronautics Board, 412 F. 2d 926, at 936 (1st cir. 1969), the Court held:

> "In sum, we find that the Board's compilation of reasons amount to little more than generalizations of principles, unsupported by underlying facts warranting either their invocation or their applicability to the apparent discriminatory aspects of the family fare. Specificity is required, or at least analysis directed to the precise issues, when the tariffs challenged are so prevalent and significant, and present such a prima facie case

of discrimination. Petitioners are entitled to the investigation sought in the complaint." [6]

When in conflict with the findings of an Administrative Law Judge the administrative agency must be most precise in stating its countervailing findings, if any.

> "As to every material issue presented, an administrative agency must make findings of fact. Further, where the agency fails to adopt the findings of the hearing examiner, the Act requires the agency to make a finding or ruling on each exception taken to the intermediate report. A bare conclusion is insufficient even when prefaced by a statement that it was reached after careful consideration of all the evidence, as here. Strikingly applicable here is the much-quoted statement of Justice Cardozo that "(W)e must know what a decision means before the duty becomes ours to say whether it is right or wrong." In re United Corporation 249 F. 2d 168,181 (3rd cir. 1957)

The bare conclusions of the Board in the Express Service Investigation are insufficient. The Board has failed to make the requisite findings to justify and to support its REA decision.

II. The Termination Of Air Express Service In the Absence Of An Adequate And Viable Substitute Service Violates Section 404 Of The Federal Aviation Act.

Section 404 (a) of the Federal Aviation Act precludes subjecting shippers to the jeopardy of loss of air express service. That section requires that every air carrier

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6 See also cf. Braniff Airways, Inc. v. C.A.B., 379 F. 2d 453 (DC cir. 1967); ABC Air Freight Co., Inc. v. C.A.B., 391 F. 2d 295 (2d cir. 1968); Carey v. C.A.B., 275 F. 2d 518 (1st cir. 1960); Northeast Airlines, Inc. v. C.A.B., 331 F. 2d 579 (1st cir. 1964)

"provide and furnish. . .air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers." Air express by REA in conjunction with the airlines has provided such through service for decades. The discontinuation of REA without first providing a viable integrated through service flies in the face of Section 404(a). A patchwork of individual airline plans and forwarder dreams provides none of the service the statute requires and REA does now provide.

Section 404(a) also requires that air carriers "establish, observe, and enforce just and reasonable individual and joint rates. . .rules, regulations relating to. . .air transportation."[7] The Board order terminating air express service without providing substitute service of equal scope and value to shippers violates the statutory command. The shipper must not thus be penalized because the Board may disapprove of REA, but can provide neither correction of REA deficiencies nor a satisfactory replacement.

III. The Board's Actions Here Parallel Those It Took in Northeast Airlines, Inc. v. C.A.B. for Which It Was Reversed.

The actions of the Board in the instant case closely parallel those it took in Northeast Airlines v. C.A.B., supra. That in the latter case the Board was sharply reversed seems to have eluded the Board. Its actions here call for reversal by this Court.

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7 See Appendix.

In the Northeast case the Board had determined in 1956 that public convenience and necessity required additional air service between Northeast and Florida and selected Northeast Airlines as fit, willing and able to perform; Northeast was granted temporary authority to operate.

In the case of REA the Board had determined in 1955 that the public convenience and necessity required a single air express system and that REA was fit, willing and able, and accordingly granted REA and the airlines participating with it continuing exemption authorizing the air express operations.

In the Northeast case, as in the Express Service Investigation, the carriers' operating authority was up for renewal. In each instance the carriers were in financial difficulties, in both instances the public convenience and necessity for the services provided was under challenge. The Board did not find either Northeast nor REA not fit, willing and able to perform; it considered the financial difficulties in each case as a factor in appraising the public convenience and necessity issue. Upon review in the Northeast case the court found that there were five reasons why the Board was persuaded "that the public convenience and necessity do not require the present authority." The Court stated at page 587:

> The reasons given are: (1) the "unsuccessful nature of Northeast operations to date," (2) the"lack of any substantial evidence that it will become successful in the future," (3) the "failure of the expected East Coast-Florida traffic growth to materialize," (4) the "fact that Eastern and National can

meet the present needs of the market" and (5) the "opportunity afforded us here to aid in the rehabilitation of Eastern."

The Board in Express Service Investigation addressed itself to a parallel five reasons.

In Northeast the Court found the first two reasons are "irrevelant to the issue of need for a third carrier on the route. . ." In the case of REA those same two reasons are irrevelant to the issue of public need for an integrated nation-wide air express service.

As to the third reason, the Court found it difficult to understand "why traffic found sufficient in 1956, which had admittedly grown to some extent since" can not support the applicant carrier and the current need for its service. In the case of REA the air express traffic found sufficient in 1956 also has grown since then and it is difficult to understand why there suddenly is no need for the service at this time.

The Board's fourth reason likewise was found lacking in substance by the Northeast Court. The Court conceded that two competing carriers or even one might theoretically replace the terminated service; it conceded that the Board has wide latitude with respect to the amount of competition in a market; but, particularly in view of the Board's findings in 1956 and the Board's concession in its Northeast opinion that some benefit to the public convenience and necessity was provided, the Court held that the Board ought to give reasons for its conclusion that the competing carriers would provide the competition and service they failed to provide in the past.

In the case of REA, the Board's comparable findings were in 1955 and it also now concedes some benefits in air express since then. As in the Northeast case the Court here should not be expected to "pass upon the legal sufficiency of the bare conclusions of the Board." (331 F. 2d at 588)

The fifth reason given in the Northeast case that the elimination of Northeast would benefit the surviving carriers is akin to the reasoning in the REA case that the elimination of REA would benefit surviving airlines and carriers who might be tempted to provide the express service they could have but have not as yet provided.

The Northeast Court concluded at page 588:

> We do not undertake to catalogue all the deficiencies in the Board's decisions. It will suffice to say to bring this opinion to an end that while we know that the Board's ultimate conclusion was to deny extension we are not sure of the basis on which it rested that conclusion. Moreover, taking face value the Board's repeated statements that the basis for its conclusion was lack of need in the market, we find the reasons given for that finding either irrelevant or inadequately developed. The case must go back to the Board for further study followed by an explicit statement of the issue or issues actually decided and a statement of relevant bases for its decision supported by intelligible findings of fact."

The same course of action appears required in this case for the same reasons.

CONCLUSION

For the reasons set forth herein the orders of the Board should be set aside and be remanded to the Board for further consideration and an intelligable statement of the factors considered, issues decided, and reasons supporting the Board's conclusions.

Respectfully Submitted

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July 29, 1974

APPENDIX

The revelant provisions of the Federal Aviation Act, 72 Stat. 731, as amended, are as follows:

RATES FOR CARRIAGE OF PERSONS AND PROPERTY

Carrier's Duty to Provide Service, Rates, and Divisions

Sec. 404 (a) (1) It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers; to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air transportation; and, in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers.

(2) It shall be the duty of every air carrier and foreign air carrier to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to foreign air transportation; and, in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between air carriers or foreign air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers or foreign air carriers.

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